

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



94-1930

To be argued by  
Roy L. Reardon

74-1930

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SERGIO POBLETE

Defendant-Appellant

---

DEFENDANT-APPELLANT'S APPENDIX



ROY L. REARDON  
Attorney for Defendant-Appellant,  
Sergio Poblete  
One Battery Park Plaza  
New York, New York 10004  
(212) 483-9000

MARTHA S. MYERS

\* Of Counsel

**PAGINATION AS IN ORIGINAL COPY**

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GENERAL DOCKET  
UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

CASE NO. 74-1930

U.S.A. v. Sergio Poblete

DATE	FILINGS PROCEEDINGS	Filed
7-9-74	Filed copies of docket entries and notice of appeal	
7-16-74	Filed record (original papers of district court)	
7-16-74	Filed Financial Affidavit	
8-16-74	Filed order: removal of record; 7 xerox copies of appellant's brief and appendix by 9-16-74 w/dismissal in default; U.S. brief and appendix if any, by 10-16-74; argument ready to be heard week of 11-11-74	
9-12-74	Filed motion for an extension of time to file appellant's brief and appendix, w/pfs	
9-13-74	Filed amended order: appellant's brief and appendix by 9-30-74 w/dismissal in default; U.S. brief by 10-30-74; argument ready to be heard week of 11-4-74	
9-27-74	Filed motion for leave to extend time to file appellant's briefs and appendices to 11-15-74	
10-7-74	Filed order: appellant's brief and appendix by 11-11-74 w/dismissal in default; U. S. brief by 12-11-74; argument to be heard week of 12-16-74	
10-16-74	Filed motion for leave to be relieved as counsel on appeal, and for assignment of counsel, with pfs (Legal Aid)	
10-18-74	Filed order granting leave to be relieved as counsel on appeal and for appointment of new counsel under CJA	
11-22-74	Filed order: Ray L. Johnson, Jr., having been appointed; transcript by 1-26-75; removal of record; 2 copies appellant's brief and appendix by 2-2-75 w/dismissal in default; U.S. brief by 2-12-75; argument ready to be heard week of 2-19-75	

WEINSTEIN  
ATTORNEYS

For U.S. AUSA CLAYMAN

## TITLE OF CASE

THE UNITED STATES

vs.  
SERGIO POLETTI

For Defendant:

Did sell cocaine not in original stamped package

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

## DATE

## PROCEEDINGS

5-17-74	Information & Waiver of Indictment filed.
5-17-74	Before WEINSTEIN J - case called - deft & counsel E.Kelly of Legal Aid present - Emanuel Ros sworn as interpreter - Deft signs Waiver of Indictment - deft arraigned and having been advised of his rights by the court and on his own behalf enters a plea of guilty as charged - sentence adjd without date.
7-5-74	Notice of motion to dismiss filed ret. 7-8-74 at 9:30 A.M.
'8-74	Before WEINSTEIN J - case called - Deft present with counsel Legal Aid Society by E.Kelly present - maximum deft sentenced to imprisonment for a period of 5 years. Motion to withdraw guilty plea denied.
7-8-74	Judgment and Commitment filed - certified copies to Marshal.
7-8-74	Notice of Appeal filed.
7-8-74	Docket entries and duplicate of Notice of Appeal mailed to C of A

ATTORNEYS

**TITLE OF CASE**

For  $U, S, \cdot$ :

THE UNITED STATES

SERGIO POBLETE, OSCAR POBLETE, RAUL HORMOZABAL,  
ELIANA MERINO, ROBERTO NIETO, LOUIS CAROL OTEY AMPUERO,  
a/k/a "Carol", GERMAN FOO, MARTIN FERNANDEZ-MEYER,  
a/k/a "Alex", LOUIS BOBADILLA, HUGO PINEDA,  
FRANK RAMOS, JOHN DOE, a/k/a "El Flaco Varela",  
JOHN DOE, a/k/a "Manolo"

For Defendant FRANK RAMOS  
Alvin Galler L. Rub

299 Broadway, NY(  
BE 3-3330

## POBLETE-Legal Aid

## Conspiracy to import cocaine into the U.S.

DATE

## PROCEEDINGS

7-20-72 Before BARTELS. J.- Indictment filed. Bench warrants ordered/issued

7-25-72 Before DODLING J - Case called - Deft FRANK RAMOS produced on a Bench Warrant - counsel A. Geller present - deft arraigned & enters a plea of not guilty - deft to furnish a P.A. bond in the sum of \$25,000 to be secured by the deposit of the deed to 405 New York Avenue Lindenhurst, N.Y. with the Clerk of the Court - posting of bail stayed until July 27, 1972.

7-25-72 Notice of Appearance filed (deft FRANK RAMOS)

7-28-72 Wxxxxxxxxxxxxxxxxxxxxxx Petition for Writ of Habeas  
Corpus Ad Prosequendum filed.

7-28-72 By Weinstein J - Writ Issued, ret. August 7, 1972 (Oscar Poblete)

8-4-72 Notice of motion filed returnable 8-11-72 for a bill of particulars  
deft. FRANK RAMOS.

# 72CR 871

DATE	PROCEEDINGS
8-4-72	By WEINSTEIN, J. - Order filed that pretrial conference shall be held on August 7, 1972 at 2:30 A.M.
7-7-72	Before WEINSTEIN J - Case called for Pre Trial and pleading, etc. Deft RAMOS & counsel Leonard Rubin present - Notice of Appearance filed by counsel - Pre Trial Conference held and concluded - defts motion for Bill of Particulars granted in part - govts motion for notice of alibi defense granted. defts bail of \$25,000 personal bond secured with deft to house continued - trial set for January 8, 1973. deft POBLETE not present pleading and pre trial conference as to him adjd to Aug. 11, 1972 at 2:00
8-8-72	Notice of Appearance filed (RAMOS)
8-10-72	Magistrate's file 72 M 1504 inserted into criminal file.
10-72	Before WEINSTEIN J - Case called - Deft POBLETE & counsel Michael Santangelo present - deft requests appt of counsel and accepts Mr. Santangelo as counsel - Deft arraigned and enters a plea of not guilty - Pre Trial Conference held - deft to be held at Federal Detention House, West St., NYC. for 30 days etc. Trial set for Jan. 8, 1973.
11-72	Before WEINSTEIN J - Case called on defts motion for Bill of Particulars (Frank RAMOS) Deft & counsel present - motion granted in part - trial set for Jan. 8, 1973.
1-5-72	Letter of Sept. 1, 1972 filed received from Chambers of Judge Weinstein from counsel Santangelo re deft Sergio Poblete. (granting extension etc)
1-5-72	By Weinstein J - Order filed granting extension. (see Order on front of letter dated 9-1-72.
1-7-72	Notice of motion filed for a bill of particulars, inspection, etc.
20-72	Before Weinstein J - Case called - Motion denied except as granted at pre trial with leave to deft to reapply for relief after consulting with U.S. Atty, etc.
1/3/73	Before WEINSTEIN, J. - Case called - Defts not present - Counsels Mr. Rubin and Mr. Santangelo present - Govts application for adjournment of trial scheduled for 1/3/73 is granted to 1/31/73 - Motion by deft Poblete for an investigator in forma pauperis is granted - Order to be submitted.
1/6/73	Govt's Bill of Particulars and Items of Discovery filed.
1/31/73	Before WEINSTEIN, J. - Case called - Trial adjd to 3/26/73 at 10:00 A.M.
2/6/73	Notice of Readiness for Trial filed.
2/6/73	Before WEINSTEIN J - Case called & trial adjd to 4-23-73.
2/7/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (VIAL)
2/7/73	By BARTELS, J. Writ issued, ret. 7/23/73.

## CRIMINAL DOCKET 72CR871

DATE	PROCEEDINGS
4/23/73	Before WEINSTEIN, J. Case called- Deft RAMOS and counsel presen Case adjd to sentencing date in 73CR405. -Case adjd to 4/27/73 a to deft OSCAR POBLETE for pleading.
4/23/73	Notice of Motion filed, ret. 4/23/73 re: dismissal of the indictment and Memorandum of Law in support of motion to dismiss filed.
4-27-73	Before WEINSTEIN J - Case called - deft POBLETE not present - adjud to May 4, 1973 for pleading.
4/30/73	Before WEINSTEIN, J.- Case called- Adjud to 5/4/73 for trial as 1. deft Poblete
5-4-73	Before Weinstein J - Case called - deft Oscar Poblete not present case adjd to May 11, 1973 at 10:00 am for disposition.
5/4/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
5/4/73	By WEINSTEIN, J.- Writ issued, ret. 5/11/73 (LUIS VIAL)
5-11-73	Before WEINSTEIN J - Case called - deft Poblete present without counsel - adjd to May 14, 1973 for disposition as to deft Poblete
5/17/73	Writs MMM retd. and filed. Executed. (VIAL)
5/21/73	Before WEINSTEIN, J.- On motion of AUSA Schlam the indictment is dismissed as to deft POBLETE, <i>Oscar</i> -
5/21/73	XXXXXX By WEINSTEIN, J.- Order of Dismissal filed. (POBLETE)
8-10-73	Affidavit of Thomas Puccio, Grand Jury Minutes of July 20, 1972, and unexecuted Bench Warrant filed (plagedx+axseakedxvau1xx #6xR9xxir6xxexxxieraxx (Martin Fernandez-Meyer)
9-5-73	Bench Warrant retd and filed - Unexecuted as to deft Fernandez-Mey and Affidavit of Victor Dragon filed.
5-6-74	Before WEINSTEIN J - case called - deft Sergio Poblete & counsel Joanne Seybert of Legal Aid present - Legal Aid assigned as counsel - Order to be submitted - deft arraigned and enters a plea of not guilty - adjd to May 8, 1974 for pre trial conferen
5-8-74	Before WEINSTEIN, J.- Case called- Deft and counsel Edward Kelly Legal Aid present- Case adjd to 5-17-74 at 10:00 A.M. for plea c (SERGIO PALETTE).

EJB:TPP:lag  
F. #721,543

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X  
UNITED STATES OF AMERICA

- against -

Cr. No.  
(21 U. S. C., §§173 and 174)

SERGIO POBLETE  
OSCAR POBLETE  
RAUL HORMOZABAL  
ELIANA MERINO  
ROBERTO NIETO  
LOUIS CAROL OTEY AMPUERO, aka "Carol"  
GERMAN FOO  
MARTIN FERNANDEZ-MEYER, aka "Alex"  
LOUIS BOBADILLA  
HUGO PINEDA  
FRANK RAMOS  
JOHN DOE, aka "El Flaco Varela"  
JOHN DOE, aka "Manolo",

Defendants.

WEINSTEIN, J.  
FILED: 7/20/72

----- X  
THE GRAND JURY CHARGES:

From on or about January 1, 1970 up to and including the date of filing of this indictment, within the Eastern District of New York, and elsewhere, the defendant SERGIO POBLETE, the defendant OSCAR POBLETE, the defendant RAUL HORMOZABOL, the defendant ELIANA MERINO, the defendant ROBERTO NIETO, the defendant LOUIS CAROL OTEY AMPUERO, aka "Carol", the defendant GERMAN FOO, the defendant MARTIN FERNANDEZ-MEYER, aka "Alex", the defendant LOUIS BOBADILLA, the defendant HUGO PINEDA, the defendant FRANK RAMOS, the defendant JOHN DOE, aka "El Flaco Varela", and the defendant JOHN DOE, aka "Manolo", together with Mario Sepulveda and Celestino Valverde, named herein as co-conspirators, but not as defendants, and others known and unknown to the Grand Jury, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

It was part of said conspiracy that the defendants would

fraudulently and knowingly import and bring into the United States large amounts of cocaine, a narcotic drug, from and through Chile, and other countries unknown to the Grand Jury, contrary to law.

It was further a part of said conspiracy that the defendants would unlawfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large amounts of cocaine, a narcotic drug, after the narcotic drugs had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed within the Eastern District of New York and elsewhere:

O V E R T   A C T S

1. On or about January 10, 1970, in Santiago, Chile, OSCAR POBLETE and SERGIO POBLETE delivered five (5) kilograms of cocaine to RAUL HORMOZABAL and Mario Sepulveda for shipment to the United States. *VICTOR DRAGON*

2. On or about January 10, 1970, RAUL HORMOZABAL and Mario Sepulveda, as stowaways aboard the S.S. Santa Lucia, departed from Valparaiso, Chile with five (5) kilograms of cocaine.

3. On or about January 25, 1970, at Newark, New Jersey, RAUL HORMOZABAL and Mario Sepulveda left the S.S. Santa Lucia with five (5) kilograms of cocaine.

4. On or about January 25, 1970, RAUL HORMOZABAL and Mario Sepulveda delivered five (5) kilograms of cocaine to SERGIO POBLETE at the San Carlos Hotel in Manhattan.

5. On or about January 25, 1970, SERGIO POBLETE handed a leather valise containing five (5) kilograms of cocaine to ELIANA

MERINO at the San Carlos Hotel in Manhattan.

6. On or about February 11, 1970, Mario Sepulveda met with SERGIO POBLETE and OSCAR POBLETE at the San Carlos Hotel in Manhattan and had a conversation concerning the removal of cocaine from a vessel.

7. On or about February 18, 1970, OSCAR POBLETE, ROBERTO NIETO, ELIANA MERINO and Mario Sepulveda travelled by automobile from New York to Norfolk, Virginia for the purpose of removing cocaine from a vessel.

8. On or about February 24, 1970, OSCAR POBLETE, ROBERTO NIETO, ELIANA MERINO and Mario Sepulveda drove to a pier in Wilmington, North Carolina.

9. On or about February 24, 1970, at Wilmington, North Carolina, LOUIS CAROL OTEY AMPUERO, aka "Carol" delivered seven (7) kilograms of cocaine to ROBERTO NIETO and Mario Sepulveda aboard the S.S. Maipo.

10. During the first week of March 1970, OSCAR POBLETE travelled from New York to Santiago Chile.

11. On or about April 1, 1970, Celestino Valverde travelled by airplane from John F. Kennedy International Airport in Queens, New York to Santiago, Chile in order to arrange for the shipment of cocaine to the United States.

12. On or about May 2, 1970, RAUL HORMOZABAL, MARTIN FERNANDEZ-MEYER, aka "Alex", LOUIS BOBADILLA, JOHN DOE, aka "El Placo Varela", Celestino Valverde, and Mario Sepulveda met at Sepulveda's apartment in Manhattan.

13. On or about May 2, 1970, at Pier #40 in Manhattan, MARTIN FERNANDEZ-MEYER, aka "Alex", LOUIS BOBADILLA and Mario Sepulveda received six (6) kilograms of cocaine from Celestino Valverde aboard the S.S. Santa Lucia.

14. On or about May 2, 1970, at Mario Sepulveda's apartment in Manhattan, RAUL HORMOZABAL and JOHN DOE, aka "Manolo" had a conversation concerning one and one-half (1 1/2) kilograms of

cocaine.

15. On or about May 3, 1970, HUGO PINEDA received three (3) kilograms of cocaine from Mario Sepulveda at Sepulveda's apartment in Manhattan.

16. On or about May 11, 1970, OSCAR POBLETE and Mario Sepulveda met with GERMAN FOO at a park near the Brooklyn waterfront.

17. On or about May 12, 1970, at Brooklyn, New York, LOUIS BOBADILLA and Mario Sepulveda received eight (8) kilograms of cocaine from GERMAN FOO aboard the S.S. Nueva Imperial.

18. On or about May 16, 1970, MARTIN FERNANDEZ-MEYER, aka "Alex", LOUIS BOBADILLA, and JOHN DOE, aka "El Flaco Varela" purchased one (1) kilogram of cocaine from Mario Sepulveda at Sepulveda's apartment in Manhattan.

19. On or about May 18, 1970, Mario Sepulveda met with FRANK RAMOS and OSCAR POBELTE in a blue automobile at 36th Street and Ninth Avenue in Manhattan.

20. On or about May 18, 1970, SERGIO POBLETE and Mario Sepulveda delivered one and one-half (1 1/2) kilograms of cocaine to FRANK RAMOS in the vicinity of the Cafe Madrid in Manhattan.

21. On or about June 19, 1970, OSCAR POBLETE and Mario Sepulveda travelled by automobile from New York to the waterfront in Baltimore, Maryland.

A TRUE BILL.

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FOREMAN

ROBERT A. MORSE  
United States Attorney  
Eastern District of New York

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, :

MOTION TO DISMISS

-against- :

74 CR 383

SERGIO POBLETE, :

(72 CR 871)

Defendant. :

-----X  
S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWARD J. KELLY, duly sworn to this 5th day of July, 1974, and upon all the papers and proceedings heretofore and herein, the undersigned will move this Court, before the Honorable JACK B. WEINSTEIN, in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on July 8, 1974 at 9:30 A.M., or as soon thereafter as counsel may be heard, for an order dismissing the information, 74 CR 383 and the indictment, 72 CR 871, filed in the above captioned case, for lack of jurisdiction over the person of the defendant, pursuant to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure; and for such other and further relief as to the Court may seem just and proper.

DATED: BROOKLYN, NEW YORK  
July 5, 1974.

Yours, etc.,

WILLIAM GALLAGHER, ESQ.,  
FEDERAL DEFENDER SERVICES UNIT  
THE LEGAL AID SOCIETY  
26 Court Street, Room 701  
Brooklyn, New York 11201

TO: DAVID D. TRAGER, ESQ.,  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK

CLERK OF THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, : AFFIDAVIT  
-against- : 72 CR 383  
SERGIO POBLETE, : (72 CR 871)  
Defendant. :  
-----X

STATE OF NEW YORK ) SS:  
COUNTY OF KINGS )

EDWARD J. KELLY, being duly sworn, deposes and says:

1. He is an attorney associated with WILLIAM GALLAGHER, ESQ., Federal Defender Services Unit/The Legal Aid Society, the attorney of record assigned to represent the defendant herein, SERGIO POBLETE.

2. This affidavit is submitted in support of defendant's motion, pursuant to Rule 12 (b)(2) of the Federal Rules of Criminal Procedure, for an order dismissing the information and the indictment in the above captioned case, on the ground that the Court lacks jurisdiction over the person of the defendant; and for such other and further relief as to the Court may seem just and proper.

3. In an indictment filed July 20, 1972, the defendant, together with twelve others, was charged with a conspiracy to import large quantities of cocaine into the United States, etc., in violation of §§173 and 174 of Title 21, United States Code. (Copy of indictment attached). This was one of a number of narcotic drug prosecutions which were based on information and testimony provided by one Mario Sepulveda.

4. On May 6, 1974, after the defendant had been brought into this country by American authorities during the prior week, he was assigned counsel, Ms. Joanna Seybert of this office, arraigned and entered a plea of not guilty. The case was adjourned to May 8, 1974 for a pre-trial conference.

On May 8, 1974, after discovery had been effected by Ms. Seybert with the Assistant United States Attorney in charge of the case, Charles Clayman, this counsel spoke with the defendant for approximately two hours in this building with the assistance of a Spanish interpreter. Ms. Paulette Harary. During this interview, counsel focused upon the allegations of the indictment and the eliciting of defendant's response to the charges. Although aware of some irregularity involving defendant's presence in this country, little attention was given to this because of what counsel considered the fixed state of the law in this area and its recent confirmation by Chief Judge Mishler in the case of United States v. Toscanino, 72 CR 194, then on appeal.

At the end of the interview, the defendant indicated a willingness to plead guilty to a lesser charge offered by the United States, the so called "tax count" (§4704 (a), Title 26, United States Code), and counsel advised the defendant that this could be an appropriate disposition of the case. However, just shortly before the defendant was to plead guilty, at 2:00 P.M., he indicated a desire for further reflection upon his plea, and the case was adjourned to May 17, 1974 at 10:00 A.M. for trial or a plea of guilty.

5. On May 13, 1974, with the assistance of a Spanish interpreter, Manuel Ras, counsel interviewed the defendant at the West Street jail and defendant indicated that he would plead guilty to the reduced charges. All pleading procedures, including waiver of indictment, were explained to the defendant. On May 17, 1974, therefore, again with the assistance of interpreter Ras, the defendant waived indictment and pleaded guilty to an information, 74 CR 383 (copy of information attached). Sentencing was adjourned for the preparation of a probation report and to provide the United States Attorney with the opportunity of receiving intelligence information from the defendant concerning traffic in narcotics.

6. On May 24, 1974, one week later, a batch of slip sheet opinions of the United States Court of Appeals arrived in our office. Among these was the decision in United States v. Toscanino, decided May 15, 1974, and counsel read this opinion for the first time. In the light thereof, the manner in which the defendant had been brought into this country took on great significance and steps were taken to explore this aspect of defendant's case more fully.

7. On May 29, 1974 counsel interviewed the defendant at West Street with the assistance of Ms. Margarita Mensa, a Spanish interpreter. The defendant gave an account of his arrest, interrogation and torture in Chile prior to his coming to the United States and had prepared a written, summary account for counsel. This is attached hereto as an exhibit, with accompanying English translation by Ms. Mensa. It is defendant's belief that what was done to him was at the behest of American authorities and that Chilean authorities were acting as the agents of the United States. Indeed, defendant believes one or more of his interrogators during the period of his custody and torture were Americans because of the manner in which they spoke Spanish.

8. On May 4, 1974, the defendant and five others were "expelled" from Chile, placed on a Braniff Airliner and brought to the United States by American agents (see attached newspaper photo and account in Spanish). One of those "expelled" with defendant was Carlos Baeza Baeza. What is alleged concerning him and his coming to this country points up the gravity of the issues involved here and the necessity of exploring fully the background of American official involvement in the uncivilized manner in which defendant was treated.

9. In an affidavit filed in United States v. Carlos

Baeza et al., 74 CR 14, Mr. Scribner, counsel for Baeza, recounts the following:

At present Mr. Fisher (Ivan Fisher, attorney for Baeza) has been informed that Baeza was transported to the United States from Chile without formal extradition proceedings and in violation of Chilean law. Specifically, Baeza was arrested and held incommunicado in Chile, and in fact was held under a name, Juan Silva Fuente, made up by the police so no one would find him. Second, while being held he was tortured. Third, Mr. Fisher has been informed that a Chilean court has ruled that Baeza's capture was unlawful under Chilean law. Though it is the government's position that Baeza was expelled from Chile, yet even if this is the case, and in view of the Chilean court order, it may not be the case, still under the Chilean law someone who is expelled is entitled to a choice of three countries to go. Here, no choice was given to Baeza. It is more than passingly strange or coincidental that when Baeza was released or expelled by the Chilean Junta, a waiting Braniff Airliner whose first class section was reserved by the United States government, was then and there available to take Baeza and six others to the United States, manacled and in the company of Drug Enforcement Administration agents who had been flown from the United States to Chile for that purpose (pp. 6, 7, motion and affidavit filed June 17, 1974)

10. Counsel believes that the United States should respond at a hearing to these allegations of its official involvement in the circumstances of the case and provide the Court with information in this regard which is peculiarly within its control. In this manner, the Court may determine the issue of whether defendant was so deprived of his due process rights in his being brought to this country that this Court does not properly have jurisdiction over his person, according to the holding in Toscanino.

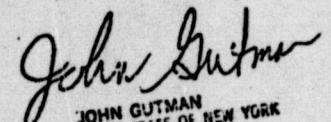
11. WHEREFORE it is respectfully urged that defendant's motion, pursuant to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, be granted; or in the alternative that a hearing be held to determine such issues as have been raised;

and for such other and further relief as to the Court may seem just and proper.



EDWARD J. KELLY

325  
Sworn to before me this  
5th day of July, 1974.



John Gutman  
JOHN GUTMAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 24-4306057  
Qualified in Kings County  
Commission Expires March 30, 1975

1           UNITED STATES DISTRICT COURT

2           EASTERN DISTRICT OF NEW YORK

3           ----- x

4           UNITED STATES OF AMERICA       :

5           - against -                   :       74-CR-383

6           SERGIO POBLETE,               :

7           Defendant.                   :

8           ----- x

9                                           United States Courthouse  
10                                           Brooklyn, New York  
11                                           July 8, 1974

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14           B e f o r e :

15                                           HONORABLE JACK B. WEINSTEIN, U.S.D.J.

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EMMANUEL KARR, hereby certify that the foregoing is a  
22                                           OFFICIAL COURT REPORTER, and accurate transcript from my sten-  
23                                           grapher in this proceeding.

24                                           Official Court Reporter  
25                                           U.S. District Court

- 14 -

1

2

2 | Appearances:

3 DAVID G. TRAGER,  
4 United States Attorney  
for the Eastern District of New York

5 BY: PAUL BERGMAN, ESQ.,  
6 EDWARD R. KORMAN, ESQ.,  
BERNARD FRIED, ESQ.,

**Assistant United States Attorneys**

9 .EDWARD J. KELLY, ESQ.  
Attorney for Defendant

10 | P a g e

13 MARGARET MENSA,  
Interpreter.

1 THE CLERK: The United States of America versus  
2 Sergio Poblete, for sentence.

3 MR. KELLY: Judge, at this time I would ask the  
4 Court to consider my motion in which I move to dismiss  
5 both the indictment and the information on the grounds  
6 that the Court lacks jurisdiction under Toscanino,  
7 also Birdzell and also under Stonehill.

8 THE COURT: In view of that motion, I think we  
9 ought to hold a hearing forthwith.

10 Are you prepared to go forward with a hearing?

11 MR. KELLY: I am, and let me say I am ready  
12 because Judge Mishler is having a similar type of hear-  
13 ing with respect to Baeza, one of the other gentlemen  
14 who came into this country. I spoke with Judge Mishler  
15 and he indicated that he would be willing to consolidate  
16 this hearing with the hearing he is going to have on  
17 the Baeza case.

18 THE COURT: I prefer to hold the hearing myself  
19 since this case was assigned to me for all purposes. I  
20 will hold it this morning.

21 MR. BERGMAN: Your Honor, may I merely say this,  
22 Mr. Clayman who has this case in the office is on trial  
23 before Judge Judd. He gave me the file just before I  
24 came into Court this morning and asked me to tell your  
25 Honor that he would be available next week for a hearing.

1 I might say that these motion papers were re-  
2 ceived by the United States Attorney on Friday of last  
3 week.

4 THE COURT: Well, let us hear the defendant's  
5 case. If we need a continuance in order for the United  
6 States Attorney to meet the case, I will give it to you  
7 in due course.

8 I see no reason for delaying the matter.

9 MR. BERGMAN: May I just have a brief adjourn-  
10 ment to contact Mr. Clayman perhaps, Judge, for just  
11 a few moments.

12 THE COURT: 11:00 o'clock for trial.

13 Thank you.

14 I have received in this case a letter from Mr.  
15 Poblete, it reached me this morning. I'm turning it  
16 over to counsel for the defendant because I intend to  
17 have it translated at the hearing. I assume that it  
18 refers to the sentence.

19 Counsel for the defendant may want to go over it  
20 with his client.

21 MR. KELLY: All right, thank you, your Honor.

22 (An adjournment was taken in the matter until  
23 11:00 o'clock a.m.)

24 (At 11:00 o'clock a.m. the matter continued.)

25 (Bernard Fried, Esq., Assistant United States

1 Attorney, then took over the matter on the part of the  
2 Government.)

THE COURT: Has the interpreter been sworn?

4 INTERPRETOR: I was sworn before your Honor at  
5 9:30.

6 THE COURT: You remain under oath.

7 (All matters then before the Court were inter-  
8 preted through the interpreter.)

9 MR. KELLY: Judge, I would like to amend my  
10 motion orally and to ask for relief other than that  
11 requested in the motion.

12 I would ask at this time to withdraw the defen-  
13 dant's guilty pleawhich was entered on May 17th. I  
14 believe that this is a discretionary matter on the part  
15 of your Honor. I believe that there are circumstances  
16 that would form the basis for your Honor exercising his  
17 discretion in it and allowing the defendant to with-  
18 draw his guilty plea at this time.

19 At the time I spoke with the defendant and he  
20 pleaded guilty, but I knew very little about the details  
21 and the circumstances under which he was brought in to  
22 the United States. I did not go into them because I  
23 felt that in the state of the fixed law of that time  
24 and the decision of Judge Mishler in the Toscanino case,  
25 which was then under appeal, that any defense with respect

1 to jurisdiction over the defendant was not viable at  
2 that time.

3 As I've indicated in my papers, a week after the  
4 defendant pleaded guilty I read the Toscanino decision  
5 for the first time. I admit I should have kept track  
6 of the Law Journal, and if there is some question as  
7 to the competency of counsel involved here, I am willing  
8 to take the blame for that.

9 I think in view of all of the circumstances that  
10 I have set forth in my papers that the defendant should  
11 be allowed to withdraw his/not guilty plea and enter  
12 a plea of not guilty.

13 I think the Federal rule is very liberal in that  
14 regard.

15 I wasn't able to find cases in the second Circuit,  
16 but there are two cases, United States against Vilosko,  
17 471 F.2d 294, and United States against Webster, 468  
18 F.2d 769. They are 9th Circuit cases and stand for the  
19 proposition that a motion to withdraw a plea before the  
20 imposition of sentence should be liberally construed  
21 by the Court, and that is what I would ask the Court to  
22 do at this time.

23 Moving on, with respect to --

24 THE COURT: Let me take care of that branch of  
25 your motion.

1                   It is denied.

2                   There is no reason to permit the withdrawal of  
3                   the plea. The inquiry made by the Court indicates that  
4                   the defendant is guilty, and the only issue is whether  
5                   the Court has jurisdiction. On that question I will  
6                   hear you.

7                   MR. KELLY: Well, I have asked for the dismissal  
8                   of the indictment in my papers.

9                   Your Honor, I have spoken with Mr. Fisher who  
10                  was involved in the Toscanino case and who has done a  
11                  great deal of investigation -- I feel really what I'm  
12                  asking at this time is not so much that the indictment  
13                  be dismissed with respect to this defendant for all  
14                  time, but actually I think what I'm asking for now,  
15                  after speaking with Mr. Fisher, is that should the Court  
16                  find that the defendant was brought here in violation  
17                  of his fourth amendment rights that he then should be  
18                  restored to the status quo ante that existed prior to  
19                  his coming here.

20                  Your Honor, in the Toscanino case, on page 3508  
21                  the Court says:

22                  "Having unlawfully seized the defendant in viola-  
23                  tion of the fourth amendment, which guarantees" "the  
24                  right of the people to be secure in their persons against  
25                  unreasonable seizures," the Government should as a matter

1 of fundamental fairness be obligated to return him to  
2 his status quo ante."

3 Your Honor, that would be to his status in  
4 Chile before he was brought to the United States.

5 THE COURT: I will hear you.

6 Call your first witness.

7 MR. KORMAN: Your Honor, could I say something  
8 at this point?

9 THE COURT: Yes.

10 MR. KORMAN: First, as to this motion, this motion  
11 -- these motion papers were served on the United States  
12 Attorney at 1:00 o'clock on the 5th of July, which was  
13 of course just last Friday. It is hardly sufficient  
14 time under the rules of this Court, nor was it practical  
15 for us to prepare for a hearing in this matter, and as  
16 a matter of fact the chief of the narcotics section  
17 was out of the country at the time and the assistant  
18 who is handling the case was before another Court.

19           In the second place, your Honor, I think the  
20           papers are patently inadequate to warrant a hearing.  
21           The only allegation of United States involvement is  
22           just some bare surmise, a surmise that possibly the  
23           United States was involved in the torture which pre-  
24           ceded this expulsion from Chile.

Finally, even if the papers were adequate, we

1       would argue, number one, that the guilty plea waived  
2       any claim to the jurisdiction of this Court;

3               Number two, if Mr. Kelly's statement is that the  
4       reason the issue was not raised before the guilty plea  
5       is that the law was different and that it has been  
6       changed by Toscanino, we argue that the decision in  
7       Toscanino cannot be applied retroactively to conduct  
8       which occurred before the date of that decision. Under  
9       the analysis employed in every retroactive decision of  
10      the Supreme Court --

11               THE COURT: No, some of them apply to cases not  
12       tried and completed.

13               MR. KORMAN: The more recent, the more recent  
14       cases have set out as the controlling date the date  
15       when the conduct which a particular exclusory rule is  
16       designed to deter. As a matter of fact the most recent  
17       opinion of the Supreme Court, Michigan against Tukka,  
18       even cut back Johnson versus New Jersey and said that  
19       as to the fruits of a violation of Miranda as opposed to  
20       the confession, that in fact Miranda well can only apply  
21       to questioning after the date of the decision.

22               Of course in this case we are dealing simply with  
23       the rule of deterrence which has absolutely no affect on  
24       the integrity of the fact finding process.

25               It is clear that the defendant is guilty, and of

1 course his custody at this point in time is pursuant  
2 to a valid order of this Court.

3 His guilty plea, it is not alleged, has in any way  
4 been affected by any torture that may have preceded  
5 his arrival into the United States.

6 The fact that the claim is jurisdictional, at  
7 least is not really that significant in terms of the  
8 retroactivity decision because I believe in Gosser  
9 versus Madden, which involved the jurisdiction of a  
10 courts marshal court to try offenses in which the Court  
11 earlier held they had no jurisdiction to try certain  
12 offenses, the Supreme Court refused to apply that deci-  
13 sion retroactively.

14 Of course this Court does have jurisdiction in  
15 the sense there is a valid indictment. Defendant is  
16 here. And the question is simply whether it should re-  
17 fuse to exercise the jurisdiction that it already has.

18 So that there is no reason in our judgement to  
19 apply Toscanino retroactively.

20 Of course we agree with the defendant that it  
21 did make a change in the well-settled law.

22 For all these reasons we don't believe that a  
23 hearing should be held, and if your Honor intends to  
24 hold a hearing, we believe we are entitled to the full  
25 notice that the rules of this Court permits.

1 Your Honor, it is highly irregular, to say the  
2 least, to be served by a motion on Friday, late Friday  
3 and where really you only have the whole weekend and  
4 to be here at 11:00 o'clock the following Monday to be  
5 ready for a hearing.

6 As I can reiterate, there is not even an affidavit.  
7 a sworn affidavit of the defendant where the allegations  
8 are as thin as they are in this particular motion.

9 THE COURT: If you need any further time to appear,  
10 we will have a continuance --

11 MR. KELLY: Your Honor, let me say this:

12 I realize that this motion was made at the  
13 eleventh hour and I apologize.

14 I would be very willing to grant the Government  
15 any adjournment they require.

16 I can only indicate that I was pressed with a  
17 lot of matters before this Court and I thought very  
18 long and hard before deciding that I had to make the  
19 motion in this case, and that is why I made it at that  
20 late hour.

I asked for the withdrawal of the /not/ guilty plea  
because I realized that there was some problem connected  
with the defendant's plea of guilty in waiving this  
particular defense. I did some research and I did find  
that in the Rosenberg case this matter was considered

1 by the Court. There Mr. Sobell claimed his conviction  
2 would be annullity if it were proved that the Court  
3 secured the jurisdiction of the person in violation  
4 of United States law and international agreements --  
5 and this motion was by Mr. Sobell -- and asking for  
6 the arrest of the judgement, which I think was denied  
7 in that case, and the Court indicated that he had  
8 waived his right to challenge personal jurisdiction in  
9 the trial because he had not prior to the trial made  
10 this motion, and also during the course of the trial  
11 when the Government indicated that his presence in the  
12 United States was achieved legally, he had not con-  
13 fronted that question at that time; in other words,  
14 the Court indicated that he preferred to take his chances  
15 on the verdict, withholding his trump card until the  
16 trial was over.

17 Now I realize that particular decision causes some  
18 problems to me, but all I can say is that because of  
19 the fixed state of the law I did not discuss fully with  
20 the defendant, I did not know all the details of his  
21 coming into this country;

22 I had not seen the Toscanino decision until about  
23 a week after the defendant had pleaded guilty.

24 So I would say that I have not really lain back  
25 in this case and depended on somebody else, as was done

1 in the Sobell case, but I do move, although belatedly,  
2 to make this motion because I think I had to make it  
3 under these circumstances.

4 THE COURT: Call your first witness, please.

5 MR. KELLY: All right.

6 Your Honor, there are just two things that  
7 perhaps should be done at this time.

8 Your Honor earlier in the day gave me a letter  
9 written in Spanish, typed in Spanish to your Honor,  
10 which is dated the 30th of June.

11 I do not know if your Honor would want to have  
12 that marked.

13 THE COURT: Yes, mark it as an exhibit in the  
14 case.

15 MR. KELLY: Can we, may we have that marked as  
16 defendant's Exhibit A?

17 There is also an English translation which Miss  
18 Minsa made between the time we were last before the  
19 Court and now, and she has this English translation of  
20 the Spanish.

21 I would like to have that marked as Defendant's  
22 Exhibit B.

23 (Continued on next page.)

24

25

1 THE COURT: Mark it A-1.

2 (Two documents duly marked as Defendant's Exhibit  
3 A and A-1 in evidence.)

4 MR. KELLY: Now, your Honor, would you wish be-  
5 fore the hearing or after the hearing to have Miss  
6 Minsa read her English translation into the record?

7 I believe she would be able to do it --

8 THE COURT: That is not necessary, it is in the  
9 record.

10 MR. KELLY: Pardon?

11 THE COURT: It is in the record now.

12 MR. KORMAN: Speaking of translations, your  
13 Honor, there is a newspaper story clipping which is  
14 attached to the motion papers that I would appreciate  
15 if we could have translated by the interpreter.

16 THE COURT: She will give you any help you want.

17 Swear the witness, please.

18 MR. KORMAN: I would, since it is a part of the  
19 record, ask that it be translated now so we know what-  
20 ever is in the motion papers. This is in support of  
21 the motion, if your Honor pleases, I don't know at this  
22 point what it says, I would like it translated right  
23 now.

24 THE COURT: Before he testifies?

25 MR. KORMAN: Yes.

1                   As it is we are not prepared to cross-examine,  
2                   but I would at least like to know what this particular  
3                   exhibit is all about.

4                   THE COURT: All right.

5                   You can translate it during the recess.

6                   THE INTERPRETOR: Yes.

7                   MR. KELLY: Your Honor doesn't want her to trans-  
8                   late it now?

9                   THE COURT: No, I want your witness.

10                  All right.

11                  I'm ready to hear any testimony if he has any  
12                  testimony to give.

13                  MR. KELLY: I will call the defendant.

14                  S E R G I O    P O B L E T E, called as a witness on his own  
15                  behalf, having been duly sworn by the Clerk of the  
16                  Court, testified as follows:

17                  DIRECT EXAMINATION

18                  BY MR. KELLY:

19                  Q        Now, Mr. Poblete, how old are you?

20                  A        I am almost fifty-three years old now.

21                  Q        Where were you born?

22                  A        In Calbuco, Chile.

23                  Q        How much education have you had?

24                  A        I went to school for three years.

25                  Q        Of what country are you a citizen of?

2 A I am a Chilean.

3. Q Have you ever renounced your Chilean citizen-  
4 ship?

5 A NO, sir.

Q Are you a citizen of any other country?

7 A NO.

10 MR. KELLY: Your Honor, I am reading from the  
11 English translation of the defendant's statement at-  
tached to the affidavit.

13 Q Directing your attention to November 13, 1973,  
were you in the City of Annergusto at that time?

A Yes, it was the time I was arrested.

16 Q And would you tell us your purpose in being in  
that city at that time?

18 A I left Santiago because when the military junta took power they began arresting everybody.

20 MR. FRIED: I object to this as being irrelevant  
to the issues.

THE COURT: Overruled.

23 A They began arresting everybody with a criminal record.

Q And was there any other purpose for your being

in Annergusto?

3                   A           Yes, because my aunt who is also my god-mother  
4                   was dying from cancer at the time.

Q Now, did there come a time while you were in  
Annergust that you were arrested by the police?

A Yes, I was arrested in my house and I was taken  
8 to the place of investigation.

9 Q What happened when you were taken to the place  
10 of investigation?

11 A I was taken there and they began questioning  
12 me. They asked me about what I had done in the United States,  
13 they asked me what was the last time that I had been in the  
14 United States, they asked me if I knew of any laboratories in  
15 the United States and they blindfolded me and they took me up  
16 stairs, and upstairs they gave me electric shocks.

17 Q Were you told at any time the purpose for which  
18 you had been arrested?

19 A Yes, I was told that they had received an order  
20 by the United States.

21 Q Were you given the assistance of counsel at any  
22 time during these interrogations?

23 A No, sir, no, they kept me incommunicado

24 Q Will you detail the specific types of mistreatment  
25 that were applied to you at this time?

2                   A     They strapped me to a chair, they blindfolded  
3     me and they placed a bag over my head so I couldn't see any-  
4     thing. Then they began applying electric shocks on my testicles  
5     and all over my body, at the same time they beat me very severely.

6                   Q     How long did their interrogation and mistreatment  
7     continue in Annergusto, Mr. Poblete?

8                   A     I received electric shocks on three occasions  
9     and I spent a total of seven days in Annergusto.

10                  Q     Did there come a time when you were taken from  
11     Annergusto to another place?

12                  A     Yes, I was taken to Santiago.

13                  Q     Where were you taken in Santiago, if you know?

14                  A     To the National Department of Investigations.

15                  Q     Were you told when you were brought to Santiago  
16     the reason for your being brought to Santiago?

17                  A     I was told that they had received an order from  
18     the United States.

19                  Q     And what happened to you when you were brought  
20     to Santiago?

21                  A     A little while after I arrived in Santiago, a  
22     little after I arrived in Santiago the tortures began again,  
23     they strapped me to a chair, I was again blindfolded and again  
24     they placed a bag over my head. They administered electric  
25     shocks again and they hit me and they beat me all over my body.

2 They also hung me from my arms in my back and my cheekbone is  
3 broken and they also broke my nose and they pulled one of my  
4 nails out from my right hand and my arms were completely  
5 swollen --

6 MR. KELLY: Your Honor, may I at this time --

7 A I passed out several times.

8 MR. KELLY: Your Honor, may I indicate to the  
9 Court and show the Court which one of the fingers of  
10 the defendant is distorted by some instrument.

11 (At this point the defendant removed his jacket  
12 and indicated points on his body where there were signs  
13 of mistreatment.)

14 THE WITNESS: My bones are out of place.

15 MR. KELLY: Let me just also draw the Court's  
16 attention --

17 THE WITNESS: My bones on my shoulders are com-  
18 pletely out of place because they hanged me for a long  
19 time.

20 MR. KELLY: I also would like you to draw the  
21 Court's attention to the fact that there is an indenta-  
22 tion on the side of this defendant's face which he has  
23 indicated to me is the place where he was struck and a  
24 bone broken.

25 THE COURT: The Court notes it for the record.

2 Let me see your hand.

3 The third finger of the right hand just shows  
4 signs of having been injured and there is an indenta-  
5 tion on the left cheekbone just beneath the eye.

6 BY MR. KELLY:

7 Q Now, would you tell us how long this interrog-  
8 tion and mistreatment lasted while you were in Santiago,  
9 Mr. Poblete?

10 A They kept me there for about ten to fifteen  
11 days. I don't remember exactly. At times they would take  
12 me out at night, sometimes they would take me out in the morn-  
13 ing.

14 Q Well, during this period of time that you were  
15 in Santiago, were you continuously interrogated and mistreated  
16 or were there times when you were not subjected to this treat-  
17 ment?

18 A The torture was almost continuous, sometimes  
19 they would take me out in the morning and then later on they  
20 would place me back in the dungeon sometimes at night, but it  
21 was almost continuous.

22 Q During this time, did you have an opportunity of  
23 consulting with an attorney?

24 A No, sir, no, I was kept incommunicado.

25 Q Were the men who interrogated you during this

2 period in Santiago all Chileans or were they, if you know,  
3 individuals from other countries?

4 A No, there were men from other countries, I could  
5 tell because of their accent.

6 Q Do you know for a fact whether any Americans  
7 were involved in your interrogations or mistreatment?

8 A I cannot tell you -- I cannot tell you for sure  
9 that there were Americans involved, but I do know there were  
10 Americans around in the Department of Narcotics down there.

11 Q Now, did there come a time when you were taken  
12 from Santiago to some other place?

13 A I was taken to the Chile stadium which is a  
14 concentration camp for political figures.

15 Q How long did you stay at that stadium?

16 A I was there under arrest until the day I was  
17 brought to the United States, which I believe was May 4th.

18 Q Do you recall the circumstances under which you  
19 left Chile to come to the United States?

20 A I was taken out of the stadium and at the time  
21 I thought that maybe I was going to be taken to another prison  
22 or maybe I was going to be released. They placed me inside  
23 a police car together with another five persons, all of us  
24 were handcuffed, and they took us to the airport. From there  
25 we were placed aboard a plane and flew to Lima.

2                   Q       Now, let me ask you this, Mr. Poblete:

3                   At the time you were placed aboard the airplane  
4                   in whose custody were you at that time?

5                   A       Under American and Chilean policemen.

6                   Q       When you were placed on the airplane and the  
7                   airplane left for Lima, in whose custody were you at that  
8                   time?

9                   A       Under the surveillance of American and Chilean  
10                  police because several American policemen also were aboard  
11                  the plane.

12                  Q       Now, at any time, if you know, were you given  
13                  the reason for your being taken out of Chile?

14                  A       No, I was not told anything except that we were  
15                  going to the United States.

16                  Q       Were you at any time given a choice as to which  
17                  country you should go to?

18                  A       No, no, we were handcuffed when we were placed  
19                  in the police car, from there we went to the plane, and we  
20                  arrived in Lima, Peru, and in Lima there was some policemen  
21                  with machine guns guarding us all the time inside a little  
22                  room, we were also handcuffed back to the plane, and from there  
23                  we flew to the United States.

24                  MR. KELLY: I have no further questions.

25                  THE COURT: This is Lima, Peru?

2 MR. KELLY: Yes, Judge.

3 THE WITNESS: Yes, sir.

4 THE COURT: The Court takes judicial notice of  
5 the fact that Peru is a separate country from Chile.

6 Do you want to cross-examine?

7 MR. FRIED: Your Honor, before I make that deci-  
8 sion, I would like a few minutes.

9 THE COURT: Take all the time you want.

10 We will take a five minute recess.

11 MR. FRIED: Thank you.

12 THE COURT: In the interim the Court would appre-  
13 ciate having the translator translate, if she will, the  
14 newspaper clipping at the request of the Government.

15 MR. KORMAN: Could we have it translated on the  
16 record?

17 THE COURT: Maybe it would be better if she just  
18 dictated it into the record now before you take your  
19 recess.

20 MR. KORMAN: Okay.

21 (At this point the translator, Miss Minsa, trans-  
22 lated the newspaper article as follows:)

23 MISS MINSA: The heading says:

24 "Another six drug traffickers are taken to the  
25 United States."

The caption under the picture says:

"In the picture the police patrols are approaching the Braniff aircraft in order to take aboard another six traffickers that the Chilean police has expelled from the country in order to deliver them to the United States justice."

"This picture has been provided by Telidario  
Channel 7 of the National."

MR. FRIED: There is no date; right?

MISS MINSA: No, there is no date.

"Saturday afternoon another six Chilean traffickers were taken to the United States. They have been involved in the smuggling of drugs. They will be indicted in that country for a conspiracy against the American people.

"The six delinquents were arrested by personnel of the Preventive Department of the Chilean Carabineros under the command of Major Luis Fontaine Manriquez.

"The people in question, Sergio Lazo Vergas, former officials of Santiago say, is considered to be a partner of Adolfo Sobosky Tobias, who is the owner of the horse stables and has been accused before the United States Attorney of the United States, he has accused his own partner, Jorgi Daved Sumar, who had a restaur-

rant on Avenue Peru and who has been accused as the manufacturer of several of the shipments of cocaine that were brought into the United States by several traffickers and also to Europe.

"Carlos Baeza, who is the former owner of the restaurant Posada Granaderos, trafficker;

"Marc Campos who used to finance the ventures of drug smuggling and who achieved a greater reputation as the business man, but the police had never dared to arrest him before during the previous regime;

"Carlos Choy Ceballos, who came from the region of Arica, and who is considered to be the most expert collaborator and manufacturer of the cocaine who has ever existed in Chile;

"And also Senior Napoleon Poblete Mayorga, who is a very well known delinquent who advanced within the criminal field from being a burglar to being a drug trafficker and also operating as a shop lifter and a pickpocket.

"These six men have been expelled from the country and they are going to meet the other fourteen traffickers who were taken to the United States previously, approximately two months ago, among which was Adolfo Soboski Tobias, Edwardo Yayorfritis and Vladimir Bandera."

1  
2 And that is it.

3  
4 MR. KORMAN: For what purpose is this being  
offered in evidence?

5  
6 MR. KELLY: Just some background as to the truth  
of the matters in which the United States was brought  
7 into it.

8  
9 MR. KORMAN: It is for the truth of the matters  
as to how they were brought to the United States, is  
10 that why it is being offered..

11  
12 MR. KELLY: Yes, for whatever weight the Court  
wishes to give it.

13  
14 THE COURT: Well, the Court will take judicial  
15 notice of the fact that there was a military junta that  
16 overthrew the prior government in Chile and that during  
17 the period in question there were widespread arrests  
18 of political persons and others by the new regime, and  
19 that it is widely reputed that there was extensive tor-  
20 ture of those that were arrested as part of the routine  
21 and regular practice as instituted by the regime on its  
22 own motion and not on the request of the United States.

23  
24 The Court also will note from the probation re-  
port as well as from the letter marked as defendant's  
Exhibit A at this hearing and from the newsclipping,  
25 which will be marked as a defendant's exhibit, that this

defendant has a long criminal record by his own admission going back to the time when he was a child in Chile, both in two other South American countries and in the United States.

Is anything else you wish me to take judicial notice of?

MR. KELLY: No, your Honor.

THE COURT: All right. You can decide what you want to do about cross-examination.

MR. KORMAN: For the record, we will object to the first part of what your Honor took judicial notice of regarding whatever practices may have been followed by the Chilean government.

THE COURT: I don't know what they did, but there is not any question that the reputa is widespread.

MR. KORMAN: I agree it is.

THE COURT: It is in the newspapers constantly.

MR. KORMAN: If that is what your Honor is taking judicial notice of, I have no objection.

THE COURT: I don't know what happened in Chile, I have never been in Chile.

You are objecting to my taking judicial notice of the reputa?

MR. KORMAN: No, I have no objection to your

2 taking judicial notice of whatever the general repute  
3 is.

4 THE COURT: There have been statements made by  
5 well-known members of the New York Bar, including  
6 Martin Garbus, who reported on his interviews in Chile  
7 as a part of a group that went down there on the invi-  
8 tation of the Chilean government.

9 All right, we will take a five minute brake.

10 Mark this exhibit, please, in evidence.

11 THE CLERK: Defendant's Exhibit B.

12 (A ten minute recess was taken and at 12:35  
13 o'clock p.m. the hearing resumed.)

14 MR. FRIED: The Government has several questions  
15 that we would like to put to this witness, your Honor.

16 Shall I begin?

17 THE COURT: Please.

18 **CROSS-EXAMINATION**

19 BY MR. FRIED:

20 Q Mr. Poblete, you mentioned on your direct examina-  
21 tion there came a time when you were taken from the airport  
22 in Santiago, Chile; is that correct?

23 A Yes.

24 Q When you arrived at the airport, do you recall  
25 who was present, when you arrived?

2           A        We were taken there by policemen dressed up as  
3           civilians and when we got aboard the plane there was a Mr.  
4           Cecile and somebody else, Mr. Frunguli, and there was also a  
5           Captain Maica of the Chilean police. And there also was a  
6           Mr. Martin, he is from Investigation.

7 Q Now, had you seen Mr. Cecile before you boarded  
8 the plane?

# 9 A NÓ

10 Q Had you seen Mr. Frunguli before you boarded  
11 the aircraft?

12 A No.

13 Q Then when you got on the aircraft, where did you  
14 sit?

15 A I was handcuffed to Daved, a man named Daved,  
16 and we both sat together in the plane, Jorgi Daved.

17 Q Mr. Poblete, when you were on the aircraft,  
18 were you seated in a certain section of the aircraft?

19 A Yes, all the prisoners and the policemen were  
20 together, there were six people.

Q In what section of the aircraft was this?

22 A I believe it was in the rear section, but I  
23 don't remember.

24 Q Now, when you were on the aircraft, were you pro-  
25 vided with food and other liquors, were you allowed to eat?

2 A Yes, we received food.

3 Q Were you allowed to go to the bathroom on the  
4 airplane?

5                   A        Well, I didn't go to the bathroom myself but  
6 other prisoners who were with me, I remember they did go.

7 Q While you were on the airplane, were you allowed  
8 to sleep?

9                   A           I did not sleep, I was handcuffed to the other  
10 man and I was very nervous.

11 Q Did any of the other Chilean prisoners aboard  
12 the aircraft with you, could they sleep?

13 A I didn't see because they were two and two and  
14 two, we were separated, the policemen were with us.

15 Q Now, at the time you were travelling on this  
16 aircraft from I believe you said Santiago, Chile, to Lima,  
17 Peru, were you at any time tortured?

**A** **NO.**

19 Q At any time as you travelled from Lima, Peru,  
20 ultimately to the United States on board this aircraft, were  
you tortured?

A No.

23 Q When you got on the airplane as you earlier  
24 stated, this was the first time that you saw these American  
25 agents, Mr. Cecile and Frunguli; is that correct?

1  
2 A Well, when we got into the plane they were there,  
3 yes.

4 MR. FRIED: I have no further questions.

5 THE COURT: Any re-direct?

6 MR. KELLY: No, Judge.

7 THE COURT: Do you have any other witnesses?

8 MR. KELLY: I would just say, your Honor, I  
9 have one other problem, and it is in these cases and  
10 that is it is very difficult for a defendant's counsel  
11 in going to South American to try to get the complete  
12 cooperation of the officials there with respect to the  
13 investigation, and I wouldn't say this is a Brady situa-  
14 tion, but it is analagous to a Brady situation in that  
15 I think it is most difficult for a defendant to produce  
16 any witnesses because of the difficulties defense counsel  
17 run into in trying to obtain them. So it is really in-  
18 cumbent on the United States to bring forth information  
19 which is peculiarly within their control in order to  
20 meet the allegations of the defendant.

21 I have in mind the Chung case, I realize that in  
22 the Chung case the Government did not have to come for-  
23 ward, but I would like to call Mr. Fisher, who has gone  
24 to South America from the point of view of how diffi-  
25 cult it is for a defense counsel to get the proper

cooperation to really support the allegations in the fashion that the Court perhaps might like then.

MR. FRIED: I would object to this witness testifying at this point.

THE COURT: I assume it is difficult.

I don't think, unless Mr. Fisher has some knowledge of this particular transaction, I don't see any point in having him as a witness.

MR. KELLY: As far as I know Mr. Fisher's focus was on Mr. Baeza in this particular case, your Honor, but he did have, as is indicated to me, some problems in getting cooperation in South America, and he also indicated that he had spoken with at least two Chilean authorities on the law who had indicated to him when a defendant is expelled from the country he is only given a choice as to the place where he may be sent.

THE COURT: Does the Government have any information that the United States agents participated in the torture of this defendant, assuming he was tortured?

MR. FRIED: The Government has no information of that kind whatsoever, your Honor, in fact I might say, for purposes of the record, that I returned last night -- rather yesterday afternoon, it was a business trip to Chile and Argentina in connection with -- not with

1  
2 this case but with another case, United States versus  
3 Baeza, and I am aware -- I was aware of the expulsion  
4 of this defendant at the same time that the other  
5 five defendants were who were reported in the news-  
6 paper article, and Carlos Baeza was one of those defen-  
7 dants, and while I was away in Chile I inquired into  
8 the circumstances of the expulsions and whether the  
9 American authorities, the American agents down there  
10 participated, and I was informed that the American  
11 authorities did not aid or procure counsel for any of  
12 the expulsions that are alleged to have occurred in  
13 this case.

14 THE COURT: All right.

15 The hearing is now closed.

16 MR. KORMAN: There is one point in addition, your  
17 Honor, which I would like the record to show, and that  
18 is that at the time he was put onto a plane in Chile,  
19 there was an indictment outstanding, there was a bench  
20 warrant outstanding for his arrest, and he had no right  
21 under the laws of or the constitution of the United  
22 States to be free of the custody of the United States  
23 Law Enforcement authorities.

24 Of course, your Honor, there was also an expulsion  
25 order which the article which was published in South

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2 America indicates, there was an expulsion order from  
3 Chile, and we would be prepared to offer the expulsion  
4 order as evidence that this was an act of the Chilean  
5 government, and therefore this distinguishes this case  
6 from Toscanino on another point, which otherwise would  
7 be retroactively applied and applicable here, since  
8 the Court of Appeals has suggested as an alternate to  
9 "kidnapping," that is as to someone for whom an arrest  
10 warrant is outstanding in the United States and who  
11 is in a foreign country, that efforts be made to obtain  
12 the cooperation of the foreign government and in agree-  
13 ing to his surrender to the United States law enforce-  
14 ment authorities, and the very exhibit attached to the  
15 motion filed on behalf of the defendant and issued con-  
16 temporaneously with the expulsion, and before any de-  
17 cision of any Court was made which would have indicated  
18 that that point was relevant, it clearly shows that  
19 he was expelled by order of the Chilean Government.

20 Whether the military junta is applying correct  
21 law is not the proper concern of the United States  
22 Court.

23 THE COURT: The Court will take judicial notice  
24 of the fact that the Government involved is recognized  
25 by the United States as both *de facto* and *de jure*.

1 Poblete-cross

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2 MR. FRIED: For the purposes of the record, the  
3 United States recognized the junta of the Republic  
4 of Chile on September 24, 1973.

5 THE COURT: Taking the defendant's testimony  
6 at face value, this court does have jurisdiction.

7 There seems to be no doubt that for some years  
8 the Government of the United States has sought the  
9 cooperation of the Government of Chile in obtaining  
10 the extradition under Chilean laws of a number of  
11 those who have been indicted and convicted, and in  
12 one case at least of various drug crimes.

13 There is no evidence that the United States  
14 Government participated in any illegal activities in  
15 Chile or in this country in connection with the expul-  
16 sion of the defendant. He was known to the police  
17 of Chile as a habitual criminal and one who had been  
18 indicted in this country in a legal and lawful manner.

19 It was not inappropriate under the circumstances  
20 for this Government to request the cooperation of the  
21 Chilean Government in obtaining the extradition of this  
22 defendant.

23 This Court has no power to inquire into the opera-  
24 tions of the Chilean laws and the nature of their  
25 extradition or expulsion procedures.

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2 Upon delivery of the defendant to the American  
3 agents, according to the law of Chile, so far as can  
4 be determined by this court, he was transported upon  
5 the basis of an arrest warrant issued in this court  
6 following indictment.

7 That indictment, so far as this court can determine,  
8 is valid.

9 He was transported by what the court can take  
10 judicial notice to be was a normal, civilian airline,  
11 Braniff Airline, on a regularly scheduled flight to  
12 this country.

13 He was not interrogated nor treated improperly  
14 by any American agent once they obtained custody.

15 Under the circumstances, the Court does not  
16 believe that the Toscanino case has any application.

17 The exercise of this court's jurisdiction, therefore,  
18 was proper.

19 In view of the fact that the defendant's counsel  
20 has not had an opportunity to examine the pre-sentence  
21 report, he will be given that report now to examine  
22 and discuss with the defendant with the aid of the  
23 interpreter.

24 The matter is placed on the calendar for sentencing  
25 at 2:30 this afternoon.

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All right.

3

Thank you. Anything further?

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MR. FRIED: One thing, your Honor, I have to be  
before Judge Mishler's court at a quarter to two. It  
might take longer than 45 minutes.

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Can we set it down for 3:00 o'clock?

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THE COURT: Try to get here as soon as you can.

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MR. FRIED: Fine.

End EK

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1 MR. KELLY: I don't think the defendant is here  
2 and the interpreter is not here. I think we have  
3 reached a resolution of this case. I would need some  
4 time to talk to the defendant. There are mechanical  
5 problems in waiving indictment, waiving the Leary  
6 defense and a few things like that.

7 THE COURT: Work it out. I'll be here all day.

8 Whenever you're ready, I'll see you.

9 MR. KELLY: Thank you.

10 THE COURT: Second call.

(Recess.)

(Continued on next page.)

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1 THE COURT: Have you had an opportunity to dis-  
2 cuss the probation report with your client?

3 MR. KELLY: Yes, I have, judge. I'm returning  
4 the probation report to the Court.

I have discussed it with the defendant. He  
feels that it is a fair and comprehensive expression  
of his background.

THE COURT: And the interpreter is continuing to interpret.

10 MR. KELLY: Yes.

11 THE COURT: I'll hear you on the sentence.

12 MR. KELLY: Judge, I would just like to bring  
13 to you attention what is clear from the report that  
14 this defendant has pleaded guilty. There is some  
15 indication in the report that he, in view of the agents,  
16 is not as culpable as his brother was and also there is  
17 some indication that the defendant has cooperated, al-  
18 though it has not been fruitful to this point. I  
19 believe the defendant will continue to cooperate and if  
20 his cooperation is fruitful in the future, I will, at  
21 some future time, within the 120 days, make an applica-  
22 tion to the Court under Rule 35, but I think the report  
23 indicates that the defendant had a very irregular and  
24 impoverished childhood.

25 He had to fend for himself very early. It was

1 not to be unexpected that he would fall into a life  
2 of crime and, unfortunately, it led to the very serious  
3 charges before the Court now.

4 I would ask your Honor in view of all the circum-  
5 stances in the case to be as lenient in imposing sen-  
6 tence as you can be.

7 THE COURT: Do you want to add anything to what  
8 your attorney has just said?

9 THE DEFENDANT: I am just asking your Honor for  
10 clemency. I have suffered a lot during these past  
11 months. I'm just praying to God that he gives me an  
12 ounce of strength to become an honest man in the future.

13 THE COURT: This is a serious crime. The Govern-  
14 ment was lenient in permitting the defendant to plead  
15 guilty to a reduced count, because he faced at least  
16 fifteen years in jail.

17 In view of the harsh treatment which he personally  
18 received in Chile as a result of torture and in view  
19 of his cooperation in plea of guilty showing some con-  
20 trition, I sentence him only to five years.

21 MR. KELLY: Thank you very much, Judge.

22 MR. FRIED: At this time the Government moves to  
23 dismiss in accordance with our agreement, indictment  
24 72CR871.

25 THE COURT: Granted.

1                   MR. KELLY: Thank you.

2                   MR. FRIED: Thank you.

3                   THE COURT: Good luck.

4                   THE DEFENDANT: Thank you very much, your Honor.

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